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No. 87-407

In the Supreme Court of the United States

OCTOBER TERM, 1987

RONALD ARTHUR OFSHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a prosecutor's use of an attorney as an informant against his client with respect to planned future crimes unrelated to a pending criminal indictment against the client requires dismissal of the pending indictment in the absence of any prejudice.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 817 F.2d 1508. The magistrate's recommendation (Pet. App. 24-41), which was adopted by the district court, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1987. A petition for rehearing was denied on July 9, 1987. The petition for a writ of certiorari was filed on September 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On a conditional guilty plea entered in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was

sentenced to four years' imprisonment and a four year special parole term. The court of appeals affirmed (Pet. App. 1-23).

1. On December 3, 1982, federal agents executing a search warrant at petitioner's office found four-and-one-half pounds of cocaine as well as other drugs and notebooks detailing petitioner's drug dealings (Pet. App. 5-6). Petitioner was arrested and indicted later that month. He retained local attorney Mel Black to represent him at the initial hearings, to prepare a motion to suppress the seized evidence, and to serve as his trial counsel. In February 1983 petitioner also retained Chicago attorney Marvin Glass to assist in his defense, with the understanding that Glass would handle all matters involving communications with the prosecutors, including negotiations relating to a possible plea agreement. *Id.* at 7. Both sides agreed to continuance of the trial to enable the plea discussions to progress, and petitioner waived his speedy trial rights (*id.* at 27-28).

In mid-April 1983, Glass learned that he was a target in the unrelated "Greylord" investigation, an investigation by federal authorities in Chicago into corruption in the Cook County, Illinois, judicial system. Anxious to reduce his own potential criminal liability, Glass offered to provide information to and cooperate with federal investigators, and he met periodically with Assistant United States Attorney Scott Turow of the Northern District of Illinois to give information on various illegal activities of which he had knowledge. Pet. App. 7. On June 8, 1983, Glass told Turow about petitioner, whom he identified as a client in a pending criminal action in Fort Lauderdale. While warning Glass not to reveal privileged communications to the government, Turow encouraged Glass to provide non-privileged information concerning petitioner's criminal activities. Glass told Turow about other individuals he had met through petitioner who discussed setting up a money

laundering scheme. Glass also told Turow that petitioner had asked Glass to help find a buyer for a ton of marijuana. *Id.* at 7-8. Glass subsequently consented to wear a body recorder and tape-record a conversation with petitioner, under strict instructions that he not discuss attorney-client matters, including defense strategy in the case in which Glass was representing petitioner. Glass told the FBI agents who fitted him with the body recorder that the criminal case against petitioner had been dismissed but that he expected that petitioner would later be reindicted. *Id.* at 11-12. Glass met with petitioner on June 14, 1983. The ensuing conversation that Glass taped did not contain any privileged information: it addressed primarily a proposed marijuana transaction and, although passing reference was made to the filed motion to suppress, there was no discussion of defense strategy. *Id.* at 18. Glass did not continue to act as an informant against petitioner after that date (*id.* at 30).

2. Prosecutors in the Southern District of Florida were not informed in June that Glass was acting as an informant against his client during his legal representation of petitioner. Contrary to what Turow and the FBI agents were led to believe in June, the government did not move to dismiss the indictment until late July 1983. The government moved to dismiss at that time to permit the completion of a plea agreement that would obligate petitioner to cooperate with the government, without the need to seek further continuances of the trial. Pet. App. 28.[1] In August 1983 a superseding information was filed against petitioner (*id.* at 29).[2]

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[1] The magistrate's opinion mistakenly cites the date of the dismissal as June 28, 1983. The correct date was July 28, 1983. See Oct. 8, 1985 Tr. 17-18.

[2] In January 1984 it appeared that the cooperation agreement would not materialize, and when petitioner threatened to move to dismiss the information, the government obtained a superseding indictment (Oct. 8, 1985 Tr. 23-24).

When Turow learned in August 1983 that the charge had been reinstated, he told the United States Attorney for the Southern District of Florida about Glass's earlier cooperation against petitioner (Pet. App. 12). To avoid any possibility of tainting the prosecutor assigned to petitioner's case, the United States Attorney did not advise the prosecutor about Glass's cooperation (*ibid.*). Shortly thereafter, Turow informed Glass that he could not continue to represent petitioner (Feb. 17, 1984 Tr. 5-6). Despite Turow's repeated instructions to Glass, Glass did not withdraw from the representation of petitioner (Pet. App. 6; Oct. 8, 1985 Tr. 70). As a result, Turow and an Assistant United States Attorney from Florida met with the district judge and told him of the situation in February 1984, so that the court could consider disqualifying Glass itself (Feb. 17, 1984 Tr. 1-13). The court agreed that Glass could not stay in the case and that petitioner should be informed of the facts (Feb. 17, 1984 Tr. 11).[3] Glass, however, did not move to withdraw from petitioner's defense until April 1984 (Pet. App. 29), and petitioner was not told of the reason for his withdrawal until the government sent his other attorney an explanatory letter in February 1985 (*id.* at 11).

3. Following the revelation of Glass's cooperation with the government, petitioner moved to dismiss the indictment based upon government misconduct. After an evidentiary hearing, a federal magistrate recommended that the district court deny that motion, as well as petitioner's motion to suppress the evidence uncovered during the warrant-authorized search. After setting out the facts (Pet. App. 24-31), the magistrate recommended rejection of petitioner's contention that he was prejudiced by Glass's informant activities. The magistrate noted that if the

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[3] Glass appealed the district court order directing that petitioner be told what had occurred. The court of appeals affirmed.

government had recorded any prejudicial statements on the body recorder, petitioner's remedy would be suppression of the statements (*id.* at 38). She also found that the government's actions, though "ill-advised, * * * do not appear to have been deliberate attempts to infringe on or destroy the defendant's attorney-client relationship with Mr. Glass" (*ibid.*). The magistrate rejected petitioner's other specific claims of prejudice that he alleged arose from the tainted attorney-client relationship. Finally, the magistrate concluded that, although "[a] careful examination of the facts in this case, taken singly and as a whole, offends this Court" (*id.* at 40), the government's conduct did not so prejudice petitioner or so "shock the conscience" of the court as to warrant dismissal of the prosecution (*id.* at 40-41). After an evidentiary hearing, the district court affirmed the magistrate's findings, adopted her recommendations (see *id.* at 22 n.7), and denied both motions.

4. The court of appeals affirmed. The court noted that since no information from the tape-recorded conversation was conveyed to the prosecutor or otherwise used against petitioner, no Sixth Amendment violation resulted from the intrusion into potentially privileged attorney-client communications. Pet. App. 18. It then found that petitioner was not prejudiced in any way by the intrusion or by Glass's continued representation. Citing this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), the court concluded that the absence of prejudice made dismissal an inappropriate remedy (Pet. App. 18-20). Finally, in a decision explicitly limited to "the unique facts of this case" and without condoning what had occurred, the court agreed that the government conduct was "not so outrageous as to 'shock the universal sense of justice' " (*id.* at 21). The court specifically noted that the invasion of the attorney-client relationship produced no evidence against petitioner. Moreover, in light of the zealous representation

provided petitioner by Black, his principal attorney, there was no evidence that petitioner had been denied his right to a competent defense (*id.* at 22).[4]

ARGUMENT

Petitioner contends (Pet. 8-12) that the government conduct at issue here was an outrageous violation of his right to counsel and requires dismissal of the indictment. There are two problems with that argument. First, petitioner does not claim to have been prejudiced in any respect by the government's actions, and this Court has clearly held that dismissal is not an appropriate remedy for a Sixth Amendment violation absent some showing of prejudice. *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981).[5]

Second, both courts below examined the facts and correctly stopped short of concluding that the government conduct at issue here was outrageous. There is nothing

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[4] The court of appeals also affirmed the district court's refusal to suppress evidence that was seized in the warrant-authorized search. Petitioner does not challenge the court of appeals' decision on that issue.

[5] *Strickland* v. *Washington*, 466 U.S. 668 (1984), upon which petitioner relies, is not to the contrary. In that case, the Court noted that a defendant convicted after a trial in which " 'an actual conflict of interest adversely affected his lawyer's performance' " may be entitled to a reversal without having to make the full showing of prejudice required in other contexts. *Id.* at 692 (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980)). But petitioner is not merely seeking a reversal of his conviction. He is seeking a dismissal of the indictment. Furthermore, petitioner is not even suggesting that he was "adversely affected" by Glass's representation. Both the district court and the court of appeals found that Glass's role as an informant did not affect his representation of petitioner on the charges brought in this case. Petitioner does not dispute those findings, but argues instead only that the government's conduct "create[d] such a substantial threat of prejudice that prejudice must be presumed" (Pet. 11). *Strickland* provides no support for that position.

inherently outrageous in using as an informant a co-conspirator who happens to be the target's defense attorney, so long as there is no attempt to intrude into a protected attorney-client relationship and no intrusion results. It is not unknown for attorneys to engage in criminal conduct with or on behalf of their clients, and a law enforcement investigation of either or both parties does not automatically infringe a constitutionally protected relationship. See, *e.g.*, *United States* v. *Cintolo*, 818 F.2d 980, 1005 (1st Cir. 1987); *United States* v. *Vaughn*, 797 F.2d 1485, 1488-1489, 1492 (9th Cir. 1986); *United States* v. *Kelly*, 749 F.2d 1541, 1551 (11th Cir.), cert. denied, 472 U.S. 1029 (1985); *United States* v. *DeLucca*, 630 F.2d 294, 301 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981).

To be sure, it is not usual that an attorney and co-conspirator becomes an informant against his client. But if there is good reason to believe that the attorney is not currently engaged in the representation of his client on a pending charge or that a particular conversation between the two will touch on nothing but joint future crimes, and if the attorney is careful and under strict instructions to avoid intruding into attorney-client or defense strategy matters, treating the attorney like a cooperating co-conspirator does not " 'shock[ ] * * * the universal sense of justice' " (*United States* v. *Russell*, 411 U.S. 423, 432 (1973) (citation omitted)). And where the investigation does not produce any tainted evidence or influence in any way the ongoing prosecution—indeed, where the prosecutor does not even know of the cooperation—there is no resulting Sixth Amendment violation. Cf. *Weatherford* v. *Bursey*, 429 U.S. 545 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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